Supreme Court, U.S.
FILED

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No.

In the

SUPREME COURT OF THE UNITED STATES

EULICE M. HOLLIMAN,
Petitioner

v.

CLARK ATLANTA UNIVERSITY, INC.
NATHANIEL ROBERTS, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHAT IS THE PROPER ANALYSIS TO BE GIVEN BY A DISTRICT COURT TO COMPLAINTS OF FEMALE EMPLOYEES THAT ARE ESSENTIALLY QUALITATIVEL DIFFERENT FROM COMPLAINTS OF SIMILARLY SITUATED MALE EMPLOYEES SO AS TO CONSTITUTE ANOTHER ASPECT OF CONDUCT PROHIBITED UNDER TITLE VII "BECAUSE OF SEX" AND NOT CONDUCT OF AN EQUAL OPPORTUNITY ABUSER?

PARTIES TO THE PROCEEDING

Petitioner is Eulice M. Holliman.

Respondents are Clark Atlanta University, Inc., and Nathaniel Roberts, Jr., Individually and in his Official Capacity as Assistant Vice President and Comptroller for Finance and Administration for Clark Atlanta University, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has not been reported, but is reproduced in the Appendix to the Petition for a Writ of Certiorari, at A1-A2.

The opinion of the United States District Court for the Northern District of Georgia has not been reported but is reproduced in the Appendix to the Petition for Writ of Certiorari at A-3.

The Report and Recommendation of the magistrate, which constitutes the findings of fact and conclusions of law of the district court is reproduced in the Appendix to the Petitioner for Writ of Certiorari at A4-A57. [FN1]

FN1. The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App.

JURISDICTION

This Court has jurisdiction pursuant to 102 Stat. 662, 28 U.S.C. § 1254(1) (1988). The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 17, 2006 (Pet. for Cert. App. A-1), no Petition for Rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-5e et seq., provides, in pertinent part, as follows: (a) It shall be unlawful employment practice for an employer – (1) to

fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Eulice M. Holliman, filed discrimination charges with the Equal Employment Opportunity Commission (EEOC), on June 22, 2001, (Pet. for Cert. App. A-166); a Determination on the merits was issued on March 15, 2002 finding that there was reason to believe Ms. Holliman was discriminated against, (Pet. for Cert. App. A-170); on May 2, 2002, Ms. Holliman sent a letter to EEOC complaining about retaliation, (Pet. for Cert. App. A-167); on October 16, 2002, EEOC issued its Notice of Right to Sue with Conciliation Failure, (Pet. for Cert. App. A-145). Ms. Holliman, commenced this action on January 16, 2003, in the United States District Court for the Northern District of Georgia, (Pet. for Cert. App. A-4). She sued respondents, Clark Atlanta University, Inc. ("CAU" or the "University") and Nathaniel Roberts, Jr. ("Roberts" or "Comptroller"), alleging that she had been discriminated against because of her sex in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e, et seq. (Pet. for Cert. App. A-143) Judge Julie E. Carnes referred case to Magistrate Linda T. Walker to resolve pending motions, including the final report and recommendation of the respondents' summary judgment motion. [FN2] (Pet. for Cert. App. A-4). Ms. Holliman asserted a hostile or abusive work environment harassment theory because of gender as the basis of her complaint. She alleged that she had been constructively discharged by CAU because it

allowed and condoned a hostile and abusive work environment for female employees to be created by its Assistant Vice President and Comptroller for Finance and Administration for Clark Atlanta University, Inc., Nathaniel Roberts, Jr., the result of which caused her physical illness, anxiety and the need for medical care. (Pet. for Cert. A-152-A-155;A-167).

> FN2. Judge Carnes by Order directed the Clerk to refer this case to a magistrate judge to resolve the pending motions. The Court noted "Title VII cases are routinely referred to a magistrate judge, pursuant to Internal Operating Procedure No. 920-2(a), NDGa." and this case was not presumably due to original complaint indicated a class action filing. (Pet. for Cert. A-58-A-59).

The case was submitted to the magistrate on October 19, 2004. The magistrate filed her report and recommendation on March 3, 2005.

Ms. Holliman was employed by CAU from July 19, 1991 until April 24, 2002, when she went out on medical disability due to the impact of her job on her health. (Pet. for Cert. App. A-166-168). She worked in the accounting department initially as an Accounts Payable Technician until she was given the duties and responsibilities of the Accounts Payable Supervisor. (Pet. for Cert. App. A-6). Richard McLemore became the Accounts Payable Manager and her immediate supervisor in February 1998, (Pet. for Cert. App. A-60), and he was the one who gave her the duties and responsibilities as the supervisor, (Pet. for Cert. App. A-61); Although Ms. Holliman's complaints about Mr. Roberts did not start until about December 2000, (Pet. for Cert. App. A-63) the record

shows CAU's female employees were complaining about Mr. Roberts' conduct toward them long before he became a full-time employee of the University. (Pet. for Cert. App. A-69-80;82;88;90). Prior to becoming an employee, Mr. Roberts worked for an accounting firm, Clausell and Associates, and was assigned as an external auditor at the University. (Pet. for Cert. App. A-62) It was in his capacity as an external auditor that he first came in contact with the general accounting department, which was mostly females, and the grants and contract department, which was mostly male. (Pet. for Cert. App. A-72). Mr. Roberts quickly established a reputation for being an abrasive and difficult person to get along with, especially among the female employees. (Pet. for Cert. App. A-70-88;92-98) One male employee, Bradley T. Goldsby, testified that it almost seemed like common knowledge that Mr. Roberts would talk to women in "a belittling way, demeaning way." (Pet. for Cert. App. A-102). If there is a common thread to be found in all the testimony of the female employees, former and current, it would be centered on the manner in which Mr. Roberts talked to them, along with what he said. For example,

Joyce Stafford testified that she observed Roberts' interaction with female employees at two universities, the CAU and Morehouse School of Medicine, both during period of time Mr. Roberts was an external auditor. The same problem happened at both schools; the female employees complained about the manner in which Mr. Roberts talked to them; since Ms. Stafford worked for a high level official in both universities, the females would come to her and she had to act as intermediary to relay information between the female staff and Mr. Roberts: they "refused to work with him any longer because of his demeaning attitude, the way that he talked with them. He

treated them like they were brainless." (Pet. for Cert. App. A-70)

Toyah Ellis came in contact with Mr. Roberts every year at audit time at CAU and recalled her interactions with him were constant conflicts. She was a supervisor in the general accounting department with all female subordinates except one male, Christian. Her immediate supervisor was Pam Pressley who Mr. Roberts would have real, real bad confrontations. Ms. Ellis recalled Mr. Roberts was super critical of the general accounting department and would hear the bulk of the confrontations between Ms. Pressley and him concerning the staff's ability. As an example of Mr. Roberts' attitude, she recalled an occasion when Mr. Roberts needed certain journal entries pulled, and one of her subordinates, Dorothy Alexander, an older person had the duty all day to sit and key journal entries; she told Mr. Roberts that she would have Ms. Alexander to pull the information and he made the remark, "Dorothy Alexander wouldn't know a journal entry if it hit her in the head." Ms. Ellis further testified Mr. Roberts would find fault with a procedure in the general accounting department but on the same matter in the mostly male grants and contracts department using the same procedure, he would say nothing. She even observed that her one male subordinate, Christian, enjoyed a more favorable relationship with Mr. Roberts than she or any of the female employees: "[h]e interacted with that group, Mr. Roberts and the male accountants in Grants and Contracts, and he made the comment with Mr. Roberts standing there one time to me because I didn't have any children and I wasn't married, and doing accounting, you would have to work long hours on closing, 'Why don't you go home and have some babies?' And Mr. Roberts

chuckled, and they went on down the hall into Grants and Contracts." Ms. Ellis recalled signing a document that might have been a petition about Roberts' conduct: "Some of us signed witnessing a behavior that he [Roberts] had toward a female staff member at the university. . . . I believe it was Tom Poitier's secretary. He yelled at her and made some offensive comments." (Pet. for Cert. App. A-71).

Latonia Franklin kept most of the files for the departments, so if the auditors needed certain files, she would normally retrieve those files, and for this reason, she had to communicate with Roberts. Ms. Franklin testified she found it very unpleasant working with him: he made her feel as if she was nothing when he was talking to her; that she was beneath him. After Thomas Poitier became her boss, she would refer Mr. Roberts to him and let Mr. Poiter give her the instructions; she got to the point where it was very difficult for her to come to work; she felt Mr. Roberts was beyond rude, and she didn't like the way he was treating her and she just couldn't take it anymore; she would end up in the bathroom crying, upset, ready to go home; it was the way he talked to her that was very degrading; she recalled one occasion that almost became physical and she walked away and told Mr. Poiter she just couldn't take it anymore; Mr. Poiter just told her "to let it go, just try to let it go, try to get past it." she filed a formal complaint with Dr. Teamer, Mr. Poitier's boss; she eventually quit working for CAU. (Pet. for Cert. App. A-73).

Marinetta Blalock testified Roberts made her feel bad: "I didn't want to come to work . . . because I did not know how to conduct myself so that I wouldn't get in trouble with him." She observed Mr. Roberts treated

male employees differently: "He seemed to be more careful when he talked to men." Ms. Blalock recalls Teja Singh as the only male she remembered Mr. Roberts "was kind of a little hands on. Mr. Singh wouldn't fight back." But she recalled how Mr. Roberts treated Mike Womble who sat on the other side of the wall with her: she doesn't know what tone Mr. Roberts used with Mr. Womble because he "took him to his office" and talked to him out of her presence or the general office presence. She testified that she didn't make any formal complaints about Roberts because "I felt like it wouldn't do any good. . . . Because I heard other people making complaints, and it seemed like nothing was done. . . . I saw it because the behavior never changed. . . . I don't know what was supposed to happen, but I'm basing it on the fact that his behavior didn't change." She testified Mr. Roberts did not properly guide her: "If I was doing something incorrectly, tell me. You don't have to yell at me. . . . I mean that belligerent tone of voice. It's no need to talk to me that way, just tell me how you want the work done." (Pet. for Cert. App. A-75).

Paula Barnes, an accountant, testified that about a month into her employment, Roberts gave her a "clerical-type assignment; it was go to some files, pull some folders, make copies of the information in the folders, put it in alphabetical order, and give it back to him. . . ." or Mr. Roberts would give her simple instructions, "he would say, you should be writing this down, simple instructions like pull a file, copy the papers in it, put them in chronological and alphabetical order. There was no need for me to write that, but he made me write it. You need to write that, so I did that. And then he made me read it back to him, those kinds of things. And then, do you understand, and I would say yes. Are you sure you

understand. I would say yes. That was just unnecessary, unprofessional, uncalled for. . . . After I would complete the assignment following those exact instructions that I had to write, he would say, this is not what I asked for. It didn't make sense. His behavior did not make sense." She testified he was rude, abrasive and "He didn't treat me as a professional on an equal level, and which I considered us to be. I had just as much experience as he did. He just kind of talked in a condescending way to me." She worked in his office one week after the first assignment: "Because I refused to work for someone who didn't have any respect for me, and I just could not work with him under those conditions." (Pet. for Cert. App. A-77).

Betty White recalls her first and last contact with Roberts about four years ago concerning petty cash of $4,000 in her custody after her supervisor Jean Chandler died; she wanted to turn in the money and she called Mr. Roberts for instructions and he told her to bring the money to him; when she finally met with him, she described Roberts' manner of talking to her as very nasty, harsh, and hitting his desk. (Pet. for Cert. App. A-78).

Jacqueline Jackson recalls meeting Roberts when he was an external auditor for CAU and he seemed likeable at that time; but after he became a full-time employee, his interaction with her changed in a negative way when she was trying resolve problems with students' scholarships money: "I was trying to explain that to him, and he just went overbroad with me. . . . He talked down to me . . . it was just like he didn't know me, he talked to me like I was somebody didn't know what I was doing. He changed my words around and threw them at me. It was just almost degrading, the way he was talking to me.

It was so upsetting to her that she told her boss, "I will not deal with him." She said, "I've never had the confrontation of having to deal with anybody like I dealt with him that day. That day was it. I said I wasn't dealing with him anymore. I told my boss I would go above or below. I would not deal with him. I was not used to being treated that way." (Pet. for Cert. App. A-79).

Annette Ogletree recalled seeing Holliman in the office crying as a result of her contact with Roberts: "She was very upset and crying because she felt as if he was picking on her. So I mean, she cried on numerous occasions. I've seen her cry after having a conversation with Mr.Roberts." Ogletree recalled some of these conversations between Holliman and Roberts occurred in his office and a couple of them out in the front: " he was out front, . . . asking her the same question over and over and over. And you could see as if he was maybe harassing her in a way. And so after she wouldn't break down and cry in front of him, but after he would leave, she would break down and cry or go to the restroom and cry." She recalled Roberts blaming her and Ms. Holliman for some checks going out in the mail and he had Mr. McLemore to write them up; as it turned it was actually Mr. McLemore who put the checks in the mail, but they got the punishment. She recalled the occasion she heard her coworker Mr. Womble saying words to the effect in reference to Plaintiff, "if looks could kill he [Mr. Roberts] would kill you" in commenting about the way Mr. Roberts would look at Ms. Holliman. (Pet. for Cert. App. A-80)

Pam Pressley was managing the accounting function and the general ledger when Mr. Roberts was an external

auditor working for Mr. Claussel; she recalled

> "He could be very charming and friendly in a group where there were people who he felt responsible to . . . But one on one, he could be very abusive in his stance and the way that he spoke, not that he was a yeller, I can't remember him yelling or raising his voice at me, but the just contempt that could come through in his voice and in his demeanor could be very intimidating."

She recalled the incident that ended her career at CAU:

> "I went into his [Roberts] office to talk to him about something that had to do with business. . . I am pretty forceful . . . I will tell you what I think, and then you tell me what you think. And that doesn't mean that I'm going to back off. And . . . I can't specifically remember what we were talking about, but he told me to get the fuck out of his face. And that's when I decided that I couldn't work there anymore, so I immediately looked for a job. . . . And even after I gave them two weeks' notice, he and Teamer [vice president for Finance] wrote me letters telling me that . . . at my level, I should . . .feel professionally responsible to give them more notice and have them prepare better to replace me. But I – at that point I didn't care because there was no consequence to him for speaking to me in that manner. And I actually went over to Dr. Teamer's office, told him what Nate had said to me and told HR [Human Resources] what Nate had said to me and filed a complaint using their rules, and there was no consequence."

Ms. Pressley recalled:

> "I can tell you that we would be standing – the accounting area was a room that had probably four desks lined up with people, employees on either side. And I would engage in conversation with him at the front of the room, and there were, . . . eight witnesses to just whatever he wanted to say to me in the most disrespectful manner, in the most intimidating manner, . . . slamming doors, marching back and forth . . . just like a Napoleon or something, . . . it was bad."

Ms. Pressley acknowledged that Mr. Roberts could be abrasive to male employees

> "but he wouldn't take it to the point of that intimidating stance . . . he was short tempered, or he would be edgy, but . . . he wouldn't be as openly hostile with the guys. . . . sometimes in my stress from work, I can be curt, . . . and he can be curt. . . .that kind of thing you would kind of expect or look over. But . . .he would be openly hostile to women. I mean, it would appear to me that he was doing it for the purpose of intimidating."

Ms. Pressley recalled observing Roberts' treatment of other female subordinates:

> ". . . there's a woman, Saba [Tesfamariam] who is Ethiopian, her husband worked in Grants and Contracts, Kif. . . . he [Mr. Roberts] made her tremble; . . . he was just awful to her. . . . speaking to her as if she were incompetent, that haughty tone of voice, only more pronounced than haughty even. It was just dripping with sarcasm, body presence closer than you needed to be in order to be respectful, . . . speaking to them [Saba and Kif] in just disrespectful tones.

> And the things he said were implied that they didn't know what they were doing, that they were incompetent, or they didn't do it in a timely manner or . . . It wasn't worth his time, that kind of thing."

Ms. Pressley recalls that the female employees didn't always engage Mr. Roberts and confront him "because it was a guarantee that the matter would escalate. . . ." Mr. Roberts "would just be as rude as he needed to be to get what he wanted when he wanted or, . . . he would intimidate the women until they were in tears or cowering in a corner somewhere. It was disgusting." Ms. Pressley recalled when the announcement was made that Mr. Roberts would become a full-time employee at CAU:

> "I made a conscious decision to tone down my own personality so that I wouldn't provoke him. I didn't want to be in a position where, number one, I was reporting to him, and, number two, I was going to have to deal with the things that I'd seen him do or experience myself when he was auditor. . . .I felt, . . . some reservation from the moment the announcement was made, I couldn't believe it."

Ms. Pressley testified Mr. Roberts' negative behavior is well-known on CAU campus. Ms. Pressley further describes Mr. Roberts conduct:

> "He was talking to me in a very disrespectful tone in front of people who worked for me. I felt that he was undermining my authority. I just felt unsafe and uneasy around him. I could tell that he was so angry sometimes that I didn't know what he would – you know what I mean? I just didn't feel safe. . . . It was beyond, I don't like the way he manages people. I think what he does is sexist. I think that he's a chauvinist. It

went beyond that. It got to the point where I really felt unsafe." (Pet. for Cert. App. A-82).

James Clausell is the principal owner of Clausell & Associates; he contracted as independent federal auditors for CAU for years 1991 through 1998, and he did limited consulting work at the Morehouse School of Medicine in about early 1997. Mr. Clausell recalls the occasion when Eli Phillips, the vice president of finance at the Morehouse School of Medicine, requested the removal of Roberts from the engagement: "He said, well, there was some conflicts with, I think, a staff person." Mr. Clausell recalls receiving complaints from Pam Pressley asking him to replace Mr. Roberts: "she said she just couldn't get along with him, they had problems getting along together. . . . I recall she was saying he was very abrasive. His personality was very hard. He wasn't agreeable," and Mr. Clausell recalls Teja Singh complained once or twice about how Mr. Roberts was abrasive, aggressive in performing his services. Mr. Clausell recalls being asked by Dr. Teamer and Dr. Cole about a recommendation on Mr. Roberts as a potential employee for CAU:

"we met to talk about Mr. Roberts taking on a position at Clark Atlanta University. Dr. Cole – and I did talk about him making that transition, asked my opinion can he do the job, is he a good person for the institution. And I deferred – or I did not conclude. I did not give him a definite answer. I said he would have to make that call and as to his personality. . . . my advice to the school was that I didn't think he was a good match. . . . Because of the complaints of Pam and Mr. Singh, and these were people I think he was going to be supervising. And I thought that

> based on their complaints, it would create a problem within that department."

Mr. Clausell didn't recall whether he gave this information to Dr. Cole, "but Charles Teamer, I did give that advice to." (Pet. for Cert. App. A-88).

Thomas W. Cole, Jr. retired from his position as president at CAU; he was president from July 1, 1989 until July 31, 2002; Dr. Teamer was the chief fiscal officer, vice president for finance, reporting directly to Cole. Dr. Cole recalled a discussion with Dr. Teamer regarding consideration of hiring Mr. Roberts, but he didn't recall whether it was in advance of hiring Roberts or not. Dr. Cole denied any complaints about Mr. Roberts' conduct from female employees; Dr. Cole recalled Dr. Teamer discussing Mr. Roberts' leadership style: "I don't remember any specific conversations other than his observation that Mr. Roberts didn't have the best people skills. But nothing beyond that." Dr. Cole denied being made aware of an EEOC complaint being filed about Mr. Roberts' conduct; he testified that Dr. Ross, who replaced Dr. Teamer as the executive vice president, did not bring any complaints about Mr. Roberts' conduct to him; however, Dr. Ross did discuss Roberts' leadership style with Dr. Cole, calling Mr. Roberts "a typical bean counter, which meant that they focused mostly on numbers rather than on people." Dr. Cole denied Bobby Young ever brought to his attention any complaints about Roberts' conduct concerning female employees. (Pet. for Cert. App. A-89)

Thomas R. Poitier recalled his secretary LaTanya Franklin brought a complaint to him about Mr. Roberts; Mr. Roberts became very upset when Ms. Franklin could

not tell the whereabouts of Mr. Poiter and he became very offensive; Mr. Poitier talked to Mr. Roberts about the incident and recalled these exact words being used by Mr. Roberts:

> "[H]e said, 'That damn girl doesn't know what she talking about,' but I said, 'She obviously – Nate, she's upset about something. Something went on. . . . I'm not here to say what happened but something happened, and she's near tears or crying.' So he said, 'She didn't know what the hell she was talking about. The damn girl didn't know what the hell she was talking about.' . . . Those are his words." (Pet. for Cert. App. A-90).

T. J. Singh at one time was the manager over the mostly male grants and contracts department; he said, "I don't remember any major conflicts"; Singh testified in a general sense that a subordinate employee would say "the accountant is hard on me"; he did not receive a single written complaint from any of his subordinate employees about Roberts; Singh testified that he did not observe Roberts asking the same question more than once to any of his subordinate employees; Singh testified that sometimes Roberts had a communication problem, "he would come, you know, like he would shout at you, . . ." Singh's opinion was Roberts could have used a better management style. Singh characterized his working relationship with Roberts as "Just a regular normal, employee and supervisor." Singh testified that he doesn't remember Roberts ever saying anything that he felt was derogatory relating to his national origin. (Pet. for Cert. App. A-91).

Melba Carmichael was Mr. Roberts' secretary for four years; she complained to Mr. Young that,

> "Mr. Roberts was just rude and nasty, he just had a personal attitude against certain people, and he was just nasty and talked to you as if you were a child. And it was very inappropriate and I'm not a child and I'm not going to be disrespected by anyone."

She testified that Mr. Roberts displayed this rude and nasty attitude basically to women:

> "[H]e would just come in with a nasty attitude; and if you didn't just jump whenever he said something, he was just nasty. . . . He tried to intimidate by just being nasty, just saying certain things, just if you respond to him in a certain way or just respond, if he – he would try to make you feel that you were stupid, that you don't know what you're talking about, and you don't have enough brains to think for yourself."
>
> Sometimes Mr. Roberts would not respond to her but would just look at her and then would go in his office and slam the door. She had these types of interactions with Mr. Roberts basically several times a day, maybe two or three times a week. She felt Mr. Roberts was going out of his way to find fault with her. She also complained to Michael Lecour, the Director of Human Resources about Mr. Roberts' conduct toward her. After the Grants and Contracts department was removed from Mr. Roberts' supervision, he commented to Ms. Carmachiel something to the effect of "it was being given to Alene Denson and Janet Scott, women, who couldn't think, I'm sure."

Ms. Carmachiel also observed Mr. Roberts treated male employees more favorable than female employees:

> "When they came in, it was like everything was fine, . . . anything they did was fine, any report that they did was fine. . . . But if a male came in and something was incorrect or not satisfactory, he would just be nice and calm and say that, okay, just fix it and whatever."

She recalled if the female accounting assistants Saba and Victoria would come with the same thing,

> "he would just talk to them – and the door would be open so I could hear . . . say things like, This is not correct. Why didn't you – did you read? Did you do your research? . . . But I have seen him have Saba in tears because of the way he spoke to her, and Victoria as well. She didn't cry, but she ended up leaving. She just gave her two weeks' notice, I think, a few weeks after that particular incident."

Mr. Roberts spoke to Daryl Givens, a male employee from the grants and contracts department, with respect. She recalled if something wasn't done or the reports weren't correct in payroll, Mr. Roberts wouldn't talk to Freddie Greer the way he talked to female employees. She observed Mr. Roberts's interactions with Ms. Holliman:

> "I had noticed him talking to Ms. Holliman in an intimidating and infuriating manner, as if he thought she couldn't think, that she was stupid and just the manner in which he talked to her."

A few times, Holliman was sick and had to go to the doctor. When she would come in, Mr. Roberts would demand a doctor excuse and require Ms. Holliman to fill out forms for absenteeism even though Ms. Holliman was in compliance with CAU policy; she observed it seemed Mr. Roberts was trying to keep record on just about everything Ms. Holliman did, but she never heard Mr.

Roberts ask Mr. McLemore to report on Ms. Ogletree or Mr. Womble. She observed Roberts started this process of watching Ms. Holliman after she went to Mr. Young about his conduct. She recalled Mr. Roberts making negative remarks about Mr. Tesfamariam and Mr. Singh, both of same Indian nationality: he would say certain things: "like those people" or

> "those type of people do this or they don't do that or they don't believe in this or they believe in that or they don't observe certain things the way we do or they run their houses – they're over their women and they tell the women what to do and the women do it and don't say anything." (Pet. for Cert. App. A-92).

Richard McLemore recalled Ms. Holliman complaining about Mr. Roberts; Mr. McLemore tried to redirect Mr. Roberts from going directly to Ms. Holliman, and it worked for a short period and then Ms. Holliman's complaints started again; he testified each time Ms. Holliman asked for her supervisory duties pay increase, he would make a request but she never received the proper pay increase; he admitted she was entitled to receive it. Apparently after the time expired to make changes to his deposition and after he resigned from CAU, Mr. McLemore prepared on his own accord a declaration and gave it to Ms. Holliman, and he recalled the following events:

> "1. Mr. Nathaniel Roberts would raise his voice only to women whenever he wanted to emphasize a point. When he talked to women he would talk in an extremely aggressive manner. The women that I am aware of this happening to are: Eulice Holliman, Saba Tesafarim, and Marinetta Blalock. When Mr. Roberts wanted to

emphasize a point to men (Teja Singh), he would take them into his office and talk to them. When I observed making a point to men he would not talk to them in the same tone as the women.

2. After Mr. Roberts spoke to Mrs. Holliman in his aggressive tone asking her questions and she replying with answers to the best of her ability, she would come into my office afterwards and complain with bouts of crying.

3. The conflicts between Mrs. Holliman and Mr. Roberts were seemingly taking a toll on her health.

4. Mr. Roberts instructed me through the use of memos to reprimand Mrs. Holliman on several occasions.

5. When Mrs. Holliman would have a doctor appointment, Mr. Roberts would always want her to fill out a leave slip and it was not necessary because she would come to work before the 3 ½ hours that were require by the university to complete a leave slip.

6. Mr. Roberts would on occasions call me into his office and discuss Mrs. Holliman work and her work habits. Mr. Roberts would ask nothing about my other subordinates. My overall observation was that Mr. Roberts was seemingly targeting Ms. Holliman, because he only had issues with her and he was only seeking to reprimand her." (Pet. for Cert. App. A-98).

Darayl Givens, a male employee in the Grants and Contracts department, testified he did not have direct contact with Mr. Roberts, that the work was directed

through Mr. Singh to him and other subordinate employees; that Mr. Roberts did not bring any complaints to him about his work; he did not have any conflicts with Mr. Roberts. (Pet. for Cert. App. A-101).

Bradley T. Goldsby, a Budget Analyst, testified there were occasions he went to Mr. Roberts' office to get some information: he never engaged in any heated discussions with Mr. Roberts; Mr. Roberts never talked to him in a demeaning or condescending manner; Mr. Roberts never raised his voice at him or act in an abrasive manner with him or act short with him or act impatient with him; Mr. Goldsby did testify that he had heard rumors that Roberts would talk to women in "a belittling way, demeaning way" and "I want to say almost seemed like common knowledge." (Pet. for Cert. App. A-102).

Malvern G. Edwards, a Senior Accountant, testified Mr. Roberts did not approach him in a demeaning or abrasive manner; that he never had any conflicts with the manner Mr. Roberts communicated with him; that he did observe conflict in the interaction between Saba and Mr. Roberts, a very upset reaction on Saba's face after communicating with Mr. Roberts; that he recalled Mr. Singh commenting that he didn't like the way Mr. Roberts talked to him, but Mr. Singh did not use the word "demeaning." (Pet. for Cert. App. A-102).

Freddie Greer, Jr., worked in the Payroll Department, testified that he has "never, not once" had any conflicts with Mr. Roberts; Mr. Greer testified Mr. Roberts is his friend, "Been over to his house, . . . go visit, talk to him once a week now. We're very close. Never had a conflict with him." . (Pet. for Cert. App. A-102).

SUMMARY OF ARGUMENT

This case turns first on whether a district court is required to consider all of the acts, prior and contemporaneous, when these acts constitute the conduct of the same successively higher supervisor being complained about by a sexual harassment plaintiff, even though majority of such acts were pertaining to other female employees, in order to establish the conduct was "because of sex" and was severe or pervasive under Title VII. This case turns also on the proper analysis to be given by a district court to complaints of female employees that are both quantitatively and qualitatively different from complaints of similarly situated male employees so as to constitute another aspect of conduct prohibited under Title VII "because of sex" and not conduct of an equal opportunity abuser. The case was submitted to a magistrate, who made findings of fact in which she found Eulice Holliman's allegations of harassment were not gender related. Specifically, the magistrate agreed with CAU that none of Mr. Roberts' comments or conduct was gender-specific or beared any relation to Ms. Holliman's protected status as a woman. The magistrate found Mr. Roberts was simply a nasty individual, who talked down to people and was not well-liked by men or women, and when taken as a whole, such conduct would not, according to a reasonable person, rise to the level of a hostile work environment for gender harassment.

The magistrate's factual findings were objected to by Ms. Holliman on several key grounds that: (1) the magistrate incorrectly concluded the additional information about Mr. Roberts' attitude and demeanor, as

reflected in his nonverbal conduct, in Ms. Holliman's affidavit contradicted her prior deposition testimony; (2) the magistrate discounted historical and contemporaneous deposition accounts of Mr. Roberts' demeaning conduct toward female employees which forced female employees to work in a qualitatively different ongoing hostile and abusive environment that male employees did not have to endure; and (3) the magistrate did erroneously strike the declaration of Mr. McLemore, a nonparty witness, on the ground it should have been produced after closing of discovery as new evidence under the FRCP 26(e), instead of as a declaration to clarify his prior deposition testimony.

In National Railroad Passenger Corporation v. Morgan, this Court affirmed the support of Morgan's claim being based upon evidence from a number of other employees describing acts of managers making racial jokes, performing racially derogatory acts, making negative comments regarding the capacity of blacks to be supervisors, many of which occurred outside the 300 day fling period, as all part of the same actionable hostile environment claim. The hostile environment was not limited to the reach of Morgan's experience alone but included the overall work environment of members of the protected class. Even though Mr. Roberts began creating a hostile environment with his abrasive and militaristic personality for CAU's female employees in general when he worked as an external auditor, CAU hired him any way as a full-time high level supervisor where he simply continued and exacerbated this pattern of conduct under the guise of a management style, to such an extent that it became common knowledge to female and male employees alike that the female employees would be abused by him with impunity. The magistrate did not

consider this pattern in addition to the nine acts specific to Ms. Holliman as showing the pervasiveness of the alleged hostile environment created by Mr. Roberts, but instead concluded the nine acts were too isolated over a relatively short period of time to rise to the level of severe or pervasive.

In the Eleventh Circuit, there appears to be inconsistency in applying the guidelines of National Railroad Passenger Corporation v. Morgan and Harris v. Forklift Systems, Inc. to consider all acts that are part of the hostile work environment claim which may fairly be said to part of one unlawful employment practice.
A hostile work environment claim should be based on consideration of those facts which show a qualitative difference which demonstrates the pervasiveness or severity of the offensive conduct was "because of sex" and not displayed the same to female and male employees alike. This perspective will both promote the purpose of Title VII to eliminate discriminatory workplace conduct which hides under a gender-neutral appearance and protect employers from sensitive employees who make unreasonable complaints about truly innocuous conduct that is displayed equally to men and women alike. The magistrate's factual findings do not fairly represent the developed record on the conduct of Mr. Roberts which permeated CAU's work environment such that all female employees were on notice that they were expected to endure his abuse as a condition of their job. The magistrate dismissed Ms. Holliman's claim by simply characterizing Mr. Roberts' conduct as criticizing Ms. Holliman's work performance in arguably a non-constructive way and perhaps a bit belittling. Applying the correct Court analysis to the magistrate's factual findings requires the reversal of the decisions below

dismissing Ms. Holliman's hostile environment claim and retaliation claim as well.

ARGUMENT

I. PROPER ANALYSIS SHOULD LOOK AT THE QUALITATIVE DIFFERENCE IN COMPLAINTS OF SIMILARLY SITUATED FEMALE AND MALE EMPLOYEES TO DETERMINE WHETHER CONDUCT IS MERELY INNOCUOUS OR DISCRIMINATORY "BECAUSE OF SEX" AND NOT MERELY CONDUCT OF AN EQUAL OPPORTUNITY ABUSER.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer ". . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin". 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1). In 1986, this Court in Meritor held that the phrase "terms, conditions or privileges" is not limited to economic or tangible discrimination, and, therefore, a hostile work environment on the basis of sex could be a violation of Title VII. In a unanimous decision, the Court announced that Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). The Court relied on the development of the offensive work environment concept as depicted in *Rogers v. EEOC*, 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), where the Court of Appeals held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an

offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The Meritor Court approved the interpretation that
"[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers...." 454 F.2d, at 238.
In 1993, this Court held conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview and if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). The emphasized that its decisions so far has "merely presented some especially egregious examples of harassment. They do not mark the boundary of what is actionable." Id. at 22. The Court equally emphasized that there is no mathematical precise test, "[b]ut we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. In 1998, the Court reiterated
"The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of

the other sex are not exposed," Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998), citing *Harris, supra,* at 25, and reiterated Title VII is prevented from expanding into a general civility code by not reaching "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." Oncale , 523 U.S. at 81. The Court emphasized that all harassment cases "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Oncale , 523 U.S. at 81-82.

The Eleventh Circuit affirmed the constraints the magistrate placed on Ms. Holliman's case by limiting the hostile or abusive work environment to just nine acts without regard to record evidence which substantiated the commonly known reputation of Mr. Roberts to abuse female employees by use of his abrasive and militaristic management style in a humiliating, ridiculing, and insulting manner that the male employees did not have to endure, which CAU had allowed to go on for so long that female employees believed nothing would be done about it. It was within the awareness of this social context Ms. Holliman objectively and subjectively believed she was being discriminated against "because of sex." The Seventh Circuit considered the question of whether the complainant could rely on evidence outside of the EEOC charge filing period. The court noted that normally the complainant has 300 days from the occurrence of an allegedly discriminatory act to file its EEOC charge but

noted the "continuing violation doctrine" as an exception. This doctrine is designed to "accommodate plaintiffs who can show that there has been a pattern or policy of discrimination continuing from outside the limitations period into the statutory limitations period, so that all discriminatory acts committed as part of this pattern or policy can be considered ... timely." Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 344 (7th Cir.1999). Then the court went on to disallow statements of others outside the EEOC charge filing period where, "Ms. Hardin admittedly knew nothing of them. We note, however, that were such noxious statements relevant to the record we considered--if in fact Anderson spoke them in the workplace or to Hardin's face within the limitations period--the thrust of this opinion could be markedly different." Hardin, 167 F.3d at 345. In another Seventh Circuit case the court concluded a reasonable trier of fact could find a "general hostility to the presence of women in the workplace" based on "the sum total of plaintiff's allegations regarding the school board decree, the discriminatory comments, the increased workload, the failure to assist plaintiff, and the evidence of attempts to hinder her performance of her job duties. Haugerud v. Amery School Dist., 259 F.3d 678, 696 (7th Cir.2001).

The Eight Circuit drawing from Harris v. Forklift Systems, Inc. held the key issue "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir.1993). The court found Kopp's evidence sufficient to overcome a summary judgment motion on her sexual harassment claim, because, "Albaghdadi was abusive to Samaritan employees. Over the course of more than a decade, Albaghdadi yelled at,

swore at, threatened, and physically endangered Samaritan employees. . . . More importantly for her Title VII claim, the incidents of abuse Kopp has cited in the record involve primarily women. . . . Further, the incidents involving female employees are of a more serious nature than those involving male employees." Kopp, 13 F.3d at 269.

Most recently, the Ninth Circuit held that "a pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate Title VII. Indeed, this case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men. There is no logical reason why such a motive is any less because of sex than a motive involving sexual frustration, desire, or simply a motive to exclude or expel women from the workplace." E.E.O.C. v. National Educ. Ass'n, Alaska, 422 F.3d 840, 845 (9th Cir.2005). The record supports a similar showing by Ms. Holliman. Mr. Young admitted he did not receive any complaints from any similarly situated male employees about Mr. Roberts. The male employees he cited were direct reports to him as was Mr. Roberts. The record shows while male employees acknowledged the abrasiveness of Mr. Roberts, none of them felt he was made to feel humiliated, ridiculed or insulted because of his gender as a male, or otherwise. Even Mr. Singh felt he had a normal employee-supervisor relationship with Mr. Roberts.

CONCLUSION

The bottom line is Mr. Roberts was a bully who loved to push his weight around with all employees. Did his conduct crossed the Title VII line when he used his normal abrasive and militaristic management style in a manner qualitatively different with female employees than he did with similarly situated male employees which clearly conveyed to the female employees that they were being humiliated, ridiculed and insulted because they were female? Therefore, was Mr. Roberts truly an equal opportunity abuser?

Respectfully Submitted,

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